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37596-6-II
NO. 81520-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD and PENNY BORISH, husband and wife,

Appellants,

v.

KEITH R. and JODI T. OLSON, husband and wife and their marital community; JOHN L. SCOTT, INC.; KIMBERLY GARTLAND and JOHN DOE, and their marital community; STEPHEN BONO and JANE DOE, and their marital community; KRISTY M. RUSSELL and JOHN DOE, and their marital community; and JIM O'BRIEN and JANE DOE, and their marital community,

Respondents.

BRIEF OF RESPONDENT KRISTY M. RUSSELL

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I. INTRODUCTION

Plaintiffs-Appellants Richard and Penny Borish entered into a real estate purchase and sale agreement (REPSA) to buy the home of respondents Keith and Jodi Olson in Gig Harbor, Washington. The Borishes negotiated with the Olsons in an arm's-length transaction and decided to proceed with the purchase on the apparent assumption that the existing residence could be extensively remodeled. During the sale process, the residence was inspected by Jim O'Brien and appraised by Kristy Russell, and the Borishes hired other professionals to look at the property. Nine months after the sale closed, the Borishes sued the Olsons, Mr. O'Brien, Ms. Russell, John L. Scott Realty, and two John L. Scott real estate agents. Their apparent aim in this litigation has been to recover the cost of erecting a new residence on the Gig Harbor property.

All of the defendants filed motions to dismiss negligence-based claims under *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). The trial court dismissed several claims, including all of the Borishes' claims against Ms. Russell. The Borishes now pursue a frontal attack on *Alejandre* and its predecessor, *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994), to argue that Washington law should afford tort remedies to purchasers in residential real estate transactions that the economic loss rule otherwise would bar.

The trial court correctly decided the negligence claims in reliance on *Alejandre*; furthermore, direct review should be denied, because the Borishes do not show that either element of *stare decisis* requires *Alejandre* to be overruled.

II. ASSIGNMENTS OF ERROR

Assignments of Error

For the purposes of direct review, Ms. Russell does not assign error to the rulings of the trial court.

Issues Pertaining to Assignments of Error

Whether Ms. Russell was properly dismissed prior to trial in reliance on this Court's holding in *Alejandre v. Bull*, when:

1. The trial court correctly relied on *Alejandre* in dismissing the negligence claims against Ms. Russell;
2. The Borishes did not establish evidence, under the clear, cogent and convincing standard, supporting all six elements of the negligent misrepresentation cause of action;
3. The trial court (in a ruling that was not appealed) prohibited the Borishes from seeking the cost of a new residence as their damages;
4. The first owner of the residence on the Olson property testified her husband built the structure on site in Gig

Harbor, refuting the Borishes' allegation that it is a "manufactured home";

5. There is no conflict in Washington law between the economic loss rule and the cause of action for negligent misrepresentation;
6. *Stare decisis* does not allow the relief requested by the Borishes, namely overruling *Alejandre* and *Berschauer/Phillips*;
7. There is no reason to import exceptions to the economic loss rule from other states' jurisprudence.

III. STATEMENT OF THE CASE

- A. **There is no credible support for the Borish allegation that the defendants should have told them the residence on the Gig Harbor property is a manufactured home.**

The Borishes have maintained throughout this litigation that they "would not have purchased the property for the agreed-upon price had they been aware that the house was in actuality a manufactured home modified without required L&I permitting, subject to many structural defects. It is a structure that cannot reasonably be improved and must be torn down." CP 18, 26, 48. The Borishes have always sought damages "for [the] value of the house" based on the alleged conduct of each defendant in "misrepresenting the nature of the house's original

construction as a manufactured home.” *Id.*

1. The Borishes negotiated the sale of the property in an arm’s-length transaction.

In October 2004, the Olsons listed for sale their one-bedroom home located at 3205 115th Avenue NW in Gig Harbor, Washington through defendant John L. Scott, Inc., by agents Kimberly Gartland and Stephen Bono. CP 643-45. The Olsons stated in their Seller’s Disclosure Statement that the home was not a manufactured home. CP 647-51. The house was listed as a stick-built home. CP 643. On January 15, 2005, the Borishes made an offer to purchase the Olsons’ property for \$650,000. CP 653. The Olsons rejected the initial offer made by the Borishes, but accepted a revised bid for \$680,000 on January 26, 2005. CP 45. A REPSA, with addenda, was completed. CP 657-70.

The Borishes planned to remodel the home after the purchase. CP 683. The initial offer had contained a provision allowing the buyers to conduct a feasibility study to determine if a remodel was possible, but the second offer submitted by the Borishes did not contain such a provision. CP 683-84. As part of their due diligence, the Borishes had the home inspected by defendant Jim O’Brien, a licensed home inspector, on February 2, 2005. CP 675. The Borishes also hired architect Lydia Aldredge to determine if the home was suitable for their plans to remodel and to provide a cost estimate for the proposed expansion. CP 682-84.

The Borishes requested that Ms. Aldredge accompany the home inspector on the inspection. CP 687. Mr. O'Brien discussed his observations of the home with Ms. Aldredge, including use of steel I-beams in the floor structure and the composition of the foundation; Ms. Aldredge did not enter the crawlspace under the home, but relied on Mr. O'Brien's comments in forming her opinion that the home could feasibly be remodeled. CP 685-86. Neither Mr. O'Brien nor Ms. Aldredge identified the structure as a manufactured home. CP 250, 917.

The Borishes' mortgage lender retained Ms. Russell to perform a residential appraisal on the Olson property. CP 695-96. Ms. Russell had limited contact with Jodi Olson on the day she visited the property. CP 699-700. Ms. Russell determined that the residence had been remodeled. CP 700. She also reviewed several sources of information regarding the property and its appurtenances. CP 701, 703-04. Ms. Russell concluded that the published information was reliable and that the Olson residence was not a manufactured home. CP 706-08.

Ms. Russell completed a Uniform Residential Appraisal Report on the Olson residence on February 8, 2005. CP 710-26. Ms. Russell specifically indicated that the residence was not a "Manufactured House." CP 710. The Report contained numerous limitations and specifically stated the intended use of the information provided, which did not include

any reliance on the Report by the Borishes: "Appraisals are for lenders; home inspections are for buyers. This appraisal does not serve as a warranty or report on the condition of the subject property, and is not a 'Home Inspection' report." CP 713, 718-19.

The Borishes have not identified any evidence in the record showing that they reasonably relied on the appraisal completed by Ms. Russell in deciding whether to complete the property purchase from the Olsons, particularly in light of the disclaimers the appraisal included.

2. The Olson residence was not built in a factory.

During discovery, the parties obtained deposition testimony from Caroline Black, who was the original owner of the residence on the property purchased by the Borishes. Ms. Black testified that the structure was based on steel beams from a mobile home that was wrecked on the Narrows Bridge in Tacoma, and erected on site in Gig Harbor, where the wiring, insulation, flooring, drywall, plumbing, roofing, and siding were installed. CP 329, 359. The construction of the residence was pursuant to permits obtained by Ms. Black's husband from Pierce County. CP 330, 360. The persons who performed the construction work were Ms. Black's husband and his friends. CP 332, 361. Ms. Black definitively testified that the residence was not a manufactured home, but was built on site in Gig Harbor. CP 330-31, 364-65. Ms. Black produced the construction

permits in her possession at the deposition. CP 331-32, 338-40, 365-66.

3. Ms. Russell never met the Borishes.

It is undisputed that during her appraisal of the Gig Harbor property, Ms. Russell never met or spoke with the Borishes. CP 610, 614, 637-38.

B. Procedural history in Pierce County Superior Court leading to the dismissal of all claims against Ms. Russell and the negligence claims against each defendant.

The Borishes filed suit in January 2006. CP 13-20. Multiple summary judgment motions were made and decided, and numerous parties and claims were dismissed, as set forth below. In February 2008, the Borishes proceeded to trial against the Olsons only on the claim of fraudulent concealment, and lost. CP 573-74.

1. The Borishes' theories of recovery against the defendants were primarily negligence claims.

Against Ms. Russell, the Borishes alleged causes of action for negligent misrepresentation and negligence relating to their purchase of the Gig Harbor property. CP 49-50. These causes of action were also asserted against all of the other defendants. *Id.* Additionally, the Borishes claimed that the John L. Scott defendants violated RCW 18.86.030, and violated the Washington Consumer Protection Act. CP 51. Ms. Russell denied the allegations against her. CP 61-68.

2. Ms. Russell sought dismissal of the claims against her, and other relief to narrow the remedies the Borishes could obtain.

Ms. Russell moved for summary judgment, seeking dismissal of all claims against her, on January 4, 2007. CP 798-825, 639-797, 1201-16. The trial court denied the motion on February 9, 2007. CP 1224-26. During oral argument, the trial court conceded that Ms. Russell's contract with the mortgage lender for the Borishes was laden with disclaimers and strong evidence that the Borishes could not have relied on her appraisal. RP, February 9, 2007, at 16. Relying on *Van Hook v. Anderson*, 64 Wn. App. 353, 824 P.2d 509 (1992), Ms. Russell filed a cross-appeal relating to the denial of this motion.¹ CP 1246-51.

Ms. Russell filed a related motion to exclude the testimony of Robert Chamberlin, who was not timely disclosed as an expert for the Borishes. CP 965-74, 975-1113, 1193-97. The trial court granted the motion in part, and limited Mr. Chamberlin's testimony to matters outside appraisal of the subject property. CP 1198-1200.

Ms. Russell later moved for partial summary judgment to limit the measure of damages available to the Borishes under their negligent

¹ As the issue before this Court is only whether direct review should be accepted, Ms. Russell does not brief the assignment of error relating to denial of her first motion for summary judgment. Should the appeal continue in the Court of Appeals, Division Two, Ms. Russell will brief the assignment of error at that time.

misrepresentation claim. Specifically, Ms. Russell sought an order establishing that the Borishes were entitled to recover only pecuniary damages available under Restatement (Second) Of Torts § 552B, not to include the cost of tearing down the residence on the Borish property, and not to include a separate award on the negligence claim. The trial court granted the motion and dismissed the negligence claim on March 6, 2007. CP 191-95. The Borishes did not appeal this order.

In relation to the motion for summary judgment filed by the John L. Scott defendants based on *Alejandre v. Bull*, Ms. Russell filed a joinder and her own motion regarding the economic loss rule on April 27, 2007. CP 168-76, 177-225, 347-353. The Borishes failed to provide evidence in their opposition that they relied on the appraisal completed by Ms. Russell. CP 245-47.

Lastly, Ms. Russell filed a motion to dismiss the Second Amended Complaint on May 11, 2007. CP 354-75. The trial court dismissed all claims against Ms. Russell before that motion was heard.

The trial court granted Ms. Russell's motion based on *Alejandre v. Bull* on May 18, 2007, and dismissed all claims against her. CP 387-89; RP, May 18, 2007, at 19-20, 23.

3. The other defendants also sought dismissal based on the economic loss rule.

The John L. Scott defendants also moved to dismiss negligence-

based claims under the economic loss rule. CP 77-87, 109-67, 376-82. Ms. Russell joined in the John L. Scott motion. CP 168-76. The trial court granted the motion (reserving the Consumer Protection Act claim for trial) on June 1, 2007. CP 414-15. The John L. Scott defendants later settled. CP 567-68.

Defendant Jim O'Brien also moved to dismiss negligence-based claims under the economic loss rule. CP 248-67, 1227-38. The trial court granted the motion and dismissed all claims against him on May 18, 2007. CP 390-92.

Respondents Keith and Jodi Olson filed a renewed motion for summary judgment, in part in reliance on *Alejandro v. Bull*. CP 416-30, 523-28. The trial court apparently denied the motion as to intentional tort claims, in an order that does not appear in the record.

4. Verdict in favor of the Olsons.

The Borishes tried their case to a Pierce County jury from February 19 to February 28, 2008. On the sole claim of fraudulent concealment, the jury found in favor of the Olsons. CP 569-72.

C. Ms. Russell's trial testimony supported the Olsons' account of events.

The Borishes have not made any trial testimony part of the record on appeal. The Borishes called Ms. Russell as a witness in their case. The Borishes elicited testimony from Ms. Russell about the appraisal process

and established the value of the land and home at the time of the transaction at \$680,000.

D. The Borishes moved for direct review to ask this Court to overrule *Alejandro*.

The Borishes filed a notice of appeal to the Court of Appeals, Division Two, on April 9, 2008. The Borishes filed a second notice of appeal on April 24, 2008, indicating their intent to obtain direct review in this Court.

On May 7, 2008, the Borishes filed their Statement of Grounds for Direct Review. On May 19, 2008, Ms. Russell filed her Answer to Statement of Grounds for Direct Review. On July 7, 2008, this Court's Deputy Clerk set the briefing schedule on direct review. The Court has granted extensions of time to file briefs to the Borishes and the respondents in orders dated September 26, October 17, November 5, December 8, and December 31, 2008.

E. The Borishes have narrowed the issues on appeal.

The Borishes have indicated that they now seek reversal of only "the summary judgment orders in favor of Russell and Olson," and not the judgment in favor of the Olsons. App. Br. at 5; *compare* CP 575. Thus, the Borishes have abandoned any issues on appeal that pertain to the trial in Pierce County Superior Court.

IV. SUMMARY OF ARGUMENT

This Court may affirm the trial court on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Here, the Borishes did not seek rescission of the REPSA, and only pursued huge tort damages from several defendants. The testimony of Caroline Black that her husband built the residence on site in Gig Harbor cannot be rebutted by the Borishes, thus emphatically showing that there was no misrepresentation by Ms. Russell in her appraisal. The economic loss rule was correctly applied to dismiss the negligent misrepresentation claim against her. As shown by the record before this Court, the Borishes never established all six elements of negligent misrepresentation by clear, cogent, and convincing evidence, and they lack the evidence to do so should the action be remanded to the trial court.

Direct review should be denied, because (1) there is no actual conflict among the decisions of the Washington appellate courts within the meaning of RAP 4.2, (2) the cause of action for negligent misrepresentation has not been overruled by the economic loss rule and its decisional law, and (3) the elements of the doctrine of *stare decisis* are not satisfied. Additionally, the Borishes cannot show justifiable reliance on any alleged misrepresentation by Ms. Russell.

V. ARGUMENT

A. **The standards of review relating to this appeal support the dismissal of Ms. Russell.**

There are three standards of review relating to the issues before this Court on the motion for direct review filed by the Borishes.

1. **The criteria for direct review under RAP 4.2 are not satisfied.**

Ms. Russell previously briefed the standard of review under RAP 4.2 in her Answer to Statement of Grounds for Direct Review, filed with this Court on May 19, 2008. *See* Russell Answer at 3-4, incorporated herein by reference.

Ms. Russell disputes that there is a true conflict in Washington's decisional law regarding the economic loss rule and causes of action for negligent misrepresentation and negligence. Thus, this Court should deny direct review pursuant to RAP 4.2(a)(3).

2. **The jury verdict on claims of fraud and misrepresentation must be given great deference on appeal.**

Ms. Russell also briefed the standard of review regarding jury verdicts on claims of fraud and misrepresentation in her Answer to Statement of Grounds for Direct Review. *See* Russell Answer at 4-5, incorporated here by reference; *see also* *Mulkey v. Spokane, Portland & Seattle Ry. Co.*, 65 Wn.2d 116, 118, 396 P.2d 158 (1964) (trial and appellate courts are bound by jury's conclusions, unless it can be said that

there is no substantial evidence to support the verdict).

3. Dismissal on summary judgment was properly granted to Ms. Russell.

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. In summary judgment proceedings, all facts and reasonable inferences are to be considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994).

The appellate court may reverse summary judgment only if the evidence could lead reasonable persons to reach more than one conclusion. On the other hand, it must affirm if there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Soprani v. Polygon Apartment Partners*, 137 Wn.2d 319, 325, 971 P.2d 500 (1999).

Because the economic loss rule was correctly applied by the trial court, and clear, cogent and convincing proof of all six elements of negligent misrepresentation was never presented by the Borishes, summary judgment was properly granted to Ms. Russell.

B. The motion for direct review should be denied.

The Borishes ask this Court to reverse its recent ruling in *Alejandre v. Bull*, and the underlying and established Washington law of

the economic loss rule, because that law prevents them from doing what they did in this action – namely, suing numerous parties that were somehow related to the Borishes' purchase of real property in Gig Harbor, Washington to recover tort damages. The Borishes lost on most claims before trial, including all claims against Ms. Russell, because Washington jurisprudence defeated those claims as a matter of law. When the Borishes finally did go to trial against the Olsons, they lost on the merits because they could not prove fraudulent concealment by clear, cogent and convincing evidence. The Borishes seek to continue this litigation simply because the law in Washington does not support the claims they advanced, and they do not agree with that law.

Here, direct review should be denied for at least three reasons: (1) there is no actual conflict among the decisions of this Court and the Washington Court of Appeals within the meaning of RAP 4.2(a)(3), (2) the cause of action for negligent misrepresentation has not been overruled by the economic loss rule and its decisional law, and (3) the elements of the doctrine of *stare decisis* are not satisfied. More to the point, the evidence introduced at trial unmistakably shows that the residence on the subject property was not built in a factory, and that the Borishes could not have reasonably relied on any opinion given by Ms. Russell, whom they did not meet and by whom advice was not rendered regarding the

construction of the residence.

1. There is no actual conflict in Washington appellate decisions within the meaning of RAP 4.2(a)(3).

Ms. Russell set forth a complete analysis of the *Alejandre* decision and the cause of action for negligent misrepresentation in her Answer to Statement of Grounds for Direct Review. See Russell Answer at 5-12, incorporated here by reference. Ms. Russell still has not identified any discernable conflict among the decisions of this Court or among the opinions of the Court of Appeals, and notes that Borishes implicitly do not either, based on their extensive recitation of cases from outside of Washington. Compare *Alejandre*, 159 Wn.2d at 677 (“the economic loss rule precludes any recovery under a negligent misrepresentation theory”), with *Stienke v. Russi*, 145 Wn. App. 544, 555-57, 190 P.3d 60 (2008) (following *Alejandre*; economic loss rule precludes tort claim for negligent misrepresentation) and *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 203-04, 194 P.3d 280 (2008) (following *Alejandre*; economic loss rule applies to bar claim of negligent misrepresentation in the sale of residential real property).

In fact, a great portion of the Borishes’ argument to this Court is that its economic loss rule decision in *Alejandre* lacks exceptions identified by courts in other states. App. Br. at 12-16, 23-29, 32-33. They

ignore that this Court did its own survey of decisions from other states in ruling on the economic loss rule in *Alejandre*; obviously this Court was well aware of the scope of decisions from other courts. *See Alejandre*, 159 Wn.2d at 683, 685, 687-88.

Lastly, the Borishes have suggested that *Alejandre* is incompatible with this Court's opinion in *Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007), which remanded a lower court decision on a negligent misrepresentation claim. As set forth in the Russell Answer to Statement of Grounds for Direct Review, there is no indication that the Court was confronted with a legal issue involving the economic loss rule in *Ross*. *See* Russell Answer at 12-13; *Ross*, 162 Wn.2d at 500.

Because the Borishes fail to show any actual conflict in Washington's appellate decisions, this Court has no grounds for granting direct review under RAP 4.2(a)(3). *See Peerless Food Products, Inc. v. State of Washington*, 119 Wn.2d 584, 590, 835 P.2d 1012 (1992).

2. *Alejandre* does not explicitly or implicitly overrule negligent misrepresentation case law.

Nowhere in *Alejandre* is it suggested that the Court intended to overrule or modify the cause of action for negligent misrepresentation recognized in Washington law. The negligent misrepresentation cases cited by the parties, including *Havens v. C & D Plastics*, 124 Wn.2d 158, 876 P.2d 435 (1994), *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d

820, 959 P.2d 651 (1998), *Condor Enterprises, Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 856 P.2d 713 (1993) and *Janda v. Brier Realty*, 97 Wn. App. 45, 984 P.2d 412 (1997), are still good law. In fact, *Ross v. Kirner* unmistakably shows this to be true.

The Borishes attack *Alejandre* because it ends their litigation against Ms. Russell. As shown below, *Alejandre* is correctly decided, it does apply to the claims brought by the Borishes, and the trial court correctly applied *Alejandre* to the negligent misrepresentation claims that all of the defendants sought to dismiss. The Borishes implicitly admit these points by requesting that *Alejandre* and its predecessor, *Berschauer/Phillips*, be overruled entirely.

Ms. Russell presumes that this Court knew what it was concluding when it decided *Alejandre v. Bull*. The fact that this Court was unanimous in the result in *Alejandre* speaks for itself. Had the Court intended to eliminate or curtail the cause of action for negligent misrepresentation, it could have easily said so. Having not done that, the Borishes now attack the *Alejandre* decision by attempting to fashion a “work around,” e.g. by creating an exception to the economic loss rule that no Washington court has considered desirable or recognized as being necessary in Washington law. The Borishes assert that the negligent misrepresentation cause of action has been “narrowed” by *Alejandre*, requiring the “fix” they

advocate. The Court should decline the Borishes' invitation because they do not satisfy the standards for overruling *Alejandre* under the *stare decisis* doctrine.

3. *Stare decisis* has two elements the Borishes fail to establish, or even to argue.

The Borishes fail to argue or to meet the two elements necessary for departing from the doctrine of *stare decisis* in this matter. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (*stare decisis* “requires a clear showing that an established rule is incorrect and harmful before it is abandoned”); *State v. Law*, 154 Wn.2d 85, 103, 110 P.3d 717 (2005) (amicus “fails to show how our prior interpretations of the [Sentencing Reform Act] are in fact incorrect. Absent such a showing, the doctrine of *stare decisis* compels us to reaffirm our prior case law construing the SRA”); *State v. Devin*, 158 Wn.2d 157, 169-71, 142 P.3d 599 (2006) (deciding both prongs met in challenge to rule that criminal conviction voided by prisoner’s death while appeal pending); *State v. Keir*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008) (Supreme Court does “not lightly set aside precedent”).

Within the meaning of Washington law, *Alejandre* and *Berschauer/Phillips* are not harmful. The Borishes do not argue, and cannot show, that the existence of the economic loss rule harms litigants in Washington’s courts. To the contrary, the economic loss rule exists to set

a boundary that all civil litigants should be aware of – the bright-line distinction between remedies available in tort and those available in contract. The Borishes ask this Court to overrule *Alejandre* and *Berschauer/Phillips* to allow them to pursue claims against Ms. Russell that ignore this analytical boundary. This Court need look no further than its own analysis in *Alejandre* to see that this attempt should be rejected – “tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.” *Alejandre*, 159 Wn.2d at 682 (citations omitted).

Nor were *Alejandre* and *Berschauer/Phillips* incorrectly decided. The *Alejandre* decision considered not only the contradictory prior lower court rulings regarding the litigants, but also the history of the economic loss rule and numerous decisions by Washington and other courts applying the economic loss rule, including *Berschauer/Phillips*. *Id.* at 682-89. *Berschauer/Phillips* (also a unanimous decision) has been the law in Washington for 14 years, and no court in Washington has suggested that it was incorrectly decided. The Borishes contend both opinions should be overruled because courts in other states have different exceptions to the economic loss rule that should be adopted in Washington.

The argument presented by the Borishes falls far short of the showing required to abandon settled law. *In re Personal Restraint of*

LaChappelle, 153 Wn.2d 1, 5, 100 P.3d 805 (2004) (under the doctrine of *stare decisis*, “once we have ‘decided an issue of state law, that interpretation is binding until we overrule it’”). Because the Borishes fail to show this Court’s decisions are harmful or incorrectly decided, the Court should not overrule *Alejandre* or *Berschauer/Phillips*. Whether other states have differing decisions regarding the economic loss rule is not enough. See *Carlile*, 147 Wn. App. at 202 (“We are not persuaded by the suggestion that other states have allowed those other than the first purchasers from a developer to recover on claims based on the implied warranty of habitability”). For example, most states have permitted litigants to recover punitive damages. Washington law is different – punitive damages are not recoverable. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996). Were the issue in this action the availability of punitive damages, this Court would hold that the issue had been decided, and uphold prior Washington cases denying the availability of punitive damages even in the face of contradictory decisions from other states. Here, the question of the application of the economic loss rule to the claims of the Borishes should be decided no differently.

C. The Borishes do not state a claim against Russell, because there was no justifiable reliance on her appraisal and resulting detriment to the Borishes.

In *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995), this Court held that an appraiser may owe a duty of care to a purchaser of residential real property. Specifically, a third party (the purchaser) hired by a mortgage lender “may state a claim for negligent misrepresentation against a real estate appraiser pursuant to Restatement (Second) Of Torts § 552.” *Id.*, 127 Wn.2d at 27. “The liability of a real estate appraiser in these circumstances extends only to those involved in the transaction that triggered the appraisal report, including, but not necessarily limited to, the buyer and the seller.” *Id.* However, where justifiable reliance on the appraiser’s report is not shown, the claim fails. *Id.* at 30. In *Schaaf*, the evidence showed “that Schaaf did not rely on the appraisal report at all” because he did not see the report for at least a year after the purchase. *Id.* at 30-31. Whether the appraiser owed and breached a duty to the purchaser is analyzed under the law of negligent misrepresentation. *Id.* at 21.

To prove negligent misrepresentation, the Borishes must submit clear, cogent and convincing evidence of the six elements of the claim:

A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the

defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 180-81, 876 P.2d 435 (1994); *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 97-98, 993 P.2d 259 (2000). Moreover, the plaintiff must not have been negligent in relying on the representation. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826-27, 959 P.2d 651 (1998); *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 52-53, 856 P.2d 713 (1993).

Ross, 162 Wn.2d at 499-500.

Here, the Borishes lack evidence to support at least three of the elements of the claim. First, there is no evidence of the second element – Ms. Russell had no intention of guiding the Borishes in their decision whether to buy the Olson property, as expressly stated in the disclaimers in the appraisal. Further, it is undisputed that the Borishes never met her or conversed with her regarding the appraisal. Had the appraisal given a value of the property less than the sale price, only then would the Borishes have had the opportunity to exercise their right to rescind the sale, and there is no evidence that Ms. Russell knew of any particular purpose the Borishes had for the property.

Second, there is no evidence of the third element – that Ms. Russell was negligent in obtaining or communicating information regarding the Olson residence. The home was built from the ground up, as confirmed by Pierce County records she reviewed, the listing of the residence for sale, Ms. Russell’s own evaluation of the structure, Mr. O’Brien’s inspection, and the subsequent testimony of the original owner, Ms. Black. The claims of the Borishes that the residence was a “manufactured home” or a “mobile home” do not stand up to ordinary scrutiny under the applicable definitions for those structures. *See* CP 342-46, 369-74; RCW 43.22.335(3), (5); RCW 46.04.302; RCW 46.04.303; 42 U.S.C. §§ 5401, 5402; 24 CFR 3280.2.

Third, there is no evidence of the fifth element – that the Borishes reasonably relied on the content of the appraisal. The appraisal was not written to express any other conclusion than the value of the property (structures and land), as measured by the sale price agreed to by the Borishes and the Olsons. The appraisal reflects that it was never intended to be reviewed as a statement regarding the construction of the residence and whether it was suitable for the intended purposes of the purchasers. To the extent the Borishes utilized it as a warranty of the construction of the residence, their reliance on the appraisal by definition was not reasonable. *See ESCA*, 135 Wn.2d at 833 (bank outside the class of

parties able to bring a negligent misrepresentation claim for preliminary draft audit because the preliminary draft was not created for bank's benefit and guidance, accounting firm did not intend to supply the information to the bank, accounting firm did not know plaintiff would provide the information to the bank, and accounting firm did not intend to influence bank's loan to plaintiff).

Fourth, there is no clear, cogent and convincing evidence that the appraisal proximately caused the plaintiffs to suffer damages. The Borishes had already completed the purchase and sale agreement with the Olsons by the time the appraisal took place. There is no identified contingency in the purchase contract that allowed the Borishes to rescind the sale based on the content of the appraisal (other than if the appraised value was less than the purchase price), and thus no claim that the Borishes suffered damages resulting from the appraisal. CP 657. Further, the Borishes did not pay for the appraisal Ms. Russell completed on behalf of their mortgage lender. They are not entitled to recover the cost of the appraisal, and they have no evidence that the appraisal completed by Ms. Russell was wrong or failed to meet industry standards. To the contrary, they are precluded from presenting any such evidence by order of the trial court (which was not appealed). CP 1198-1200. Without this evidence, the negligent misrepresentation claim fails as a matter of law.

See Ruff v. King County, 125 Wn.2d 697, 707, 887 P.2d 886 (1995) (court cannot find negligence based on speculation or conjecture; no issue of fact existed regarding condition of the roadway in road design action), and *Schaaf*, 127 Wn.2d at 30 n.12 (“Olson was not a structural engineer, but provided only his best professional estimate of the value of the home. It is not clear that Olson’s valuation of the house was flawed at all”); *see also Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 842, 116 S. Ct. 1813, 135 L. Ed. 2d 113 (1996) (“party whose fault did not proximately cause the injury is not liable at all”).

There is nothing in the record to show that the Borishes can establish, under the clear, cogent and convincing standard, all six elements of the negligent misrepresentation cause of action. Absent that evidence, the claim fails as a matter of law, and there is no basis for remanding the action to the trial court.

D. The trial court correctly dismissed all claims against Russell in reliance on *Alejandro v. Bull*.

The Borishes do not, and cannot, allege physical injury to a person or damage to their property resulting from the alleged acts of the defendants, including Ms. Russell. As a result, the only damages they may claim are purely economic – “If the claimed loss is an economic loss and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.” *Alejandro*, 159 Wn.2d at 684. *Alejandro*

confirmed that in Washington the economic loss rule applies to tort claims brought by homebuyers. *Id.* at 685. “If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Id.* at 683.

Further, there is “no requirement that a risk of loss must be expressly allocated in a contract before a tort claim based on that loss will be precluded under the economic loss rule.” *Alejandre*, 159 Wn.2d at 677-78. Washington courts have previously held that the economic loss rule applies even when the parties to the dispute have not signed a bilateral contract. *Berschauer/Phillips*, 124 Wn.2d at 828 (“when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in § 552 and, thus, purely economic damages are not recoverable”); *Carlson v. Sharp*, 99 Wn. App. 324, 330, 994 P.2d 851 (1999) (“courts have shown a reluctance to allow homeowners to recover in tort from design professionals and the policy reasons for this reluctance are readily applied to this case”). Here, the rationale of *Berschauer/Phillips* and *Carlson* equally applies to the tort claims asserted by the real property purchasers (the Borishes) against a professional supplying appraisal services relating to the purchase transaction (Ms. Russell).

At issue in this action is whether the Borishes may state a cause of action against Ms. Russell for tort damages relating to her appraisal of the Gig Harbor property. The loss alleged can be characterized only as an economic loss. See *Stieneke*, 145 Wn. App. at 559 (there is “no reason to draw a distinction between the defective and the damaged parts of the improvements; the point is that both are subjects of the parties’ contract and any assurances of their condition should be evaluated through that agreement”). Where the appraisal is subsumed in a written agreement between the Borishes and their mortgage lender, in which the appraisal was clearly contemplated by the parties as conditional to the completion of the loan and the purchase of the subject property (and the risk of any negligence in the appraisal could have been allocated by contract), the rationale of *Alejandre* applies, and the trial court correctly dismissed the negligent misrepresentation claim in reliance on the economic loss rule as set forth in Washington law. The “economic loss rule applies where the parties could or should have allocated the risk of loss, or had the opportunity to do so.” *Id.* at 687. Because “the parties’ relationship is governed by contract and the loss claimed is an economic loss, the trial court correctly concluded that plaintiffs’ negligent misrepresentation claim must be dismissed.” *Id.* at 686; RP, May 18, 2007, at 19-20.

Were this Court to reverse the summary judgment order dismissing Ms. Russell, it would be a *de facto* declaration that an appraiser cannot include disclaimers and limitations on scope of use of an appraisal in transactional documents, thus vastly increasing the risk of litigation for appraisers and ultimately increasing transaction costs for all residential real property purchasers. Such a result would not comport with the plain language of *Alejandre*, 159 Wn.2d at 683 (“the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain”). *See also Berschauer/Phillips*, 124 Wn.2d at 827 (“fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract”).

E. The Pierce County jury has already decided the Borishes failed to prove the elements of misrepresentation.

Lastly, the Court must question what would occur if it decided to reverse the trial court and remand this action for further proceedings. At this juncture, the Borishes are presumptively seeking a new trial against Ms. Russell and the Olsons only on the negligent misrepresentation claims. App. Br. at 5. But the jury’s verdict in this action still stands, and the finding that the Borishes did not justifiably rely on any alleged misrepresentations by the Olsons is the law of the case and binding on this

Court. *See* CP 571 (Verdict Form, Answer to Question No. 10).

The case against Ms. Russell is even weaker. As noted by the trial court, the appraisal report is laden with disclaimers, and clearly was not intended to be relied upon by the Borishes as a warranty of the construction of the residence. RP, February 9, 2007, at 16; CP 713. Ms. Russell correctly identified the residence as not being a “Manufactured House.” CP 710. The evidence is that the residence was built from the ground up in Gig Harbor, as testified to by Caroline Black. The Borishes presumably seek remand to establish at trial that Ms. Black did not know what she was talking about, Ms. Russell intended for the Borishes to rely on an appraisal expressly limited in scope and prepared for a mortgage lender, and that they are entitled to obtain tort damages to pay for construction of a new residence on the property. This is precisely the situation the economic loss rule was adopted to prevent.

VI. CONCLUSION

There is no need for the Supreme Court to clarify, much less overrule, the holdings of *Alejandre v. Bull* and *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, and no true conflict exists in Washington decisions relating to the economic loss rule and the cause of action for negligent misrepresentation. The invitation to import an “independent duty exception” to the economic loss rule is merely another way of requesting

the availability of tort damages relating to real property purchases, and accepting the invitation will lead to far more, not less, confusion in Washington's jurisprudence.

Ordinarily, this matter would be remanded to the Court of Appeals, Division Two, for further appellate proceedings pursuant to RAP 4.2(e)(1). This Court should deny direct review and terminate the appeal, however, because the grounds for direct review are not satisfied and the lower appellate courts cannot overrule Supreme Court precedent, as requested by the Borishes.

RESPECTFULLY SUBMITTED this 30 day of January, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January ~~14~~³⁰, 2009, caused service of the *Brief of Respondent Kristy M. Russell* via ABC Legal Messengers, Inc.

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